IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1054 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
BALMUKUND CHUNILAL GAUR & 3

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Appearance :
MR AJ DESAI APP for Appellant
MS SONAL D VYAS for Respondents

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE M.R. SHAH

Date : 17/12/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1. Instant appeal is preferred by the appellant - State of Gujarat under Section 378 of the Criminal Procedure Code against the judgment and order delivered by Additional Sessions Judge, 5th Fast Track Court, Surat on 30.04.2005 in Sessions Case No.253/1995, whereby the present respondents being accused of the said Sessions Case came to be acquitted by the trial Court for the charges levelled against them under Sections 302, 201, and 34 of the Indian Penal Code as well as under Section 135 of the Bombay Police Act.

2. In all, there were four accused in the said Sessions Case, but while serving of notice in Criminal Misc. Application No.5609/2007, filed by the State of Gujarat for condonation of delay, it was found that accused No.1, respondent No.1, herein Balmukund Chunilal Gaur had died and, therefore, the appeal abates against the respondent No.1 – Balmukund Chunilal Gaur.

3. Learned APP Mr.A.J.Desai, for the appellant – State of Gujarat was heard. Leave to appeal is granted. Appeal is admitted. As against the remaining respondents No.2, 3 and 4, learned advocate Ms.Sonal D. Vyas waives service of notice of admission on behalf of the respondents No.2, 3 and 4.

4. Learned APP Mr.A.J.Desai for the appellant – State of Gujarat and learned advocate Ms.Sonal D. Vyas for the respondents No.2, 3 and 4 requested this Court to take up this appeal for final hearing

as the Record & Proceedings summoned from the trial Court was available with this Court and that they would assist the Court by supplying extra copies of the evidence and documents produced during the trial. In the facts and circumstances of this case, request made by learned counsels, is granted and the matter is taken up for final hearing. According to the prosecution case, the complaint came to be filed by one Udayraj Dudhnath Tivari before Udhna Police Station, Surat to the effect that the complainant belonging to the District : Jonpur. The complainant had four sons and they were plying in all three rickshaws in Surat. Deceased in this case are two sons of the complainant and their names were Laxmikant and Ravikant. On 09.06.1994 at about 11.00 p.m., after taking dinner, while complainant was at his residence, deceased Laxmikant and Ravikant conveyed to him that one Pandey was earlier driving their rickshaw had told them that Pandey was not willing to drive their rickshaw because their rickshaw was in danger. Thereafter, both the deceased went to sleep. On the next day, both of them had been to Railway Station for rickshaw business, but had not returned. On 10.06.1994, complainant offered his complaint before the police and stated that on that day, somebody from public informed him that their rickshaw had met with an accident at Bamroli bridge. The complainant went to Bamroli bridge along with his friends and found that rickshaw No.GRQ – 681 was parked near the bridge, and in one pit near the bridge, deadbody of his two sons Laxmikant and Ravikant were

lying. There were injuries on their body and it was obvious that there was no accident with the rickshaw and that someone had murdered his two sons. In the complaint, he show his suspicion upon the accused on the ground that the accused had earlier kidnapped one of his neighbour and his sons had supported his neighbour Chandrashekhar Upadhyaya, who was kidnapped by the accused and, therefore, it was possible that accused might have killed his two sons. A crime came to be registered before Udhna Police Station vide C.R.No.I-105/1994 for the above said offences. After investigation, even after by D.C.B., P.I. Shri J. R. Tiwari on 11.12.1995, a charge-sheet came to be filed against the accused in the Court of Judicial Magistrate, First Class, Surat and was registered as Criminal Case No.2196/1995. Learned Judicial Magistrate, First Class, Surat, therefore, committed this case to the Court of Sessions which was registered as Sessions Case No.253/1995 and was made over to the trial Court.

5. The trial Court framed charge against the accused vide Ex.9 on 19.03.2002. Each of the accused pleaded not guilty and hence, they were put to trial. The prosecution examined as many as eighteen witnesses to prove its case and also submitted necessary documents on record. Thereafter, the learned trial Judge further recorded the statements of each of the accused under Section 313 of the Criminal Procedure Code wherein the accused stated that they were innocent and the evidence was not correct. The learned

trial Judge, thereafter, heard the prosecution and the defense and came to the above conclusion of acquitting the accused and hence, this appeal by the State.

6. Learned APP Mr.A.J.Desai for the appellant – State of Gujarat and learned advocate Ms.Sonal D. Vyas for the respondents No.2, 3 and 4 were heard in detail in respect of this appeal.

7. We have gone through the Record & Proceedings thoroughly and we have re-appreciated the evidence. We have considered the vital features of the case and reasonable probabilities arising out of the circumstances of the evidence recorded during the trial. We have scrutinized the reasoning given by the trial Court for acquittal.

8. Undoubtedly, the case remains upon the circumstantial evidence and there is no direct evidence to connect the accused with the crime. Though so-called four effective witnesses have been examined by the State to prove its case, but except previous enmity with the accused on account of kidnapping the neighbour of the complainant and since the complainant and his sons supported the kidnapped neighbour, nothing is coming out from the evidence to connect the accused with the crime. Panch witness Mansukhbhai Virjibhai Patel, Vasant Nago Visave, Omprakash Badrinath Dube

and Premshankar Matadin Tiwari have turned hostile and have not supported the panchnamas produced on record at Ex.19, 21, 23 and 24. The complainant – Udayraj Dudhnath Tiwari, father of the deceased examined at Ex.51 as P.W.10. Brothers of the deceased, P.W.11 - Shrikant Udayraj Tiwari and P.W.12 – Krishnakant Udayraj Tiwari are examined at Exs.54 and 56. P.W.14 - Dr.Mohammad Ikbal Hushen Qureshi is examined at Ex.60 who had conducted the postmortem. Police witnesses who investigated the offence are examined as P.W.17 and P.W.18, at Exs.85 and 87.

9. We have noticed while re-appreciating the evidence that two sons of the complainant and complainant himself and his brother-in-law, thus, four witnesses at the most have stated about the previous enmity of the accused, and except that, none of the independent witnesses even has supported that theory. When we appreciated the evidence of the complainant, we find that there are contradictions in the evidence as well as the in First Information Report filed by the complainant about the theory proposed by the complainant about the incident. While two sons submitted about the different theory that on earlier night the accused had been to their house and they were made to sleep inside the house instead of corridor outside the house. It is also stated by Shrikant that at that time, accused had been to his house and inquired about his brother. While Krishnakant examined at Ex.56 stated different theory that at about 7.00 p.m. at night, while he was cooking, Ravikant his

brother had been to him and inquired about the Laxmikant. Of course, Krishnakant also stated that at late night of the incident, accused had been to them and had inquired about Laxmikant and Ravikant and had beaten by the accused. However, from the evidence of these witnesses, it appears that deceased had not been to their house after 7.00 p.m. of the night of the incident. This is in contradiction to what is said by the complainant.

10. However, in any case, if the evidence of these four witnesses i.e. P.W.10 - Udayraj Dudhnath Tiwari, P.W.11 - Shrikant Udayraj Tiwari, P.W.12 – Krishnakant Udayraj Tiwari and P.W.13 – Vijayman Ramtilavan Dube are taken on their face value as it is, there is nothing found from their evidence incriminating the accused and connecting any of the accused with the crime alleged against them. Mere previous enmity or simply because the accused were inquiring about the deceased on previous night, without any further connection, would not lead to the conclusion that the accused had committed the murder of Laxmikant and Ravikant.

11. This is an appeal against the acquittal, law is well settled as to the scope of the appeal against the acquittal. In the matter of **AJIT SAVANT MAJAGAVI Vs. STATE OF KARNATAKA**, as reported in **(1997) 7 SCC 110**, the Hon'ble Supreme Court has observed in para-16 as under.

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers, it possesses while hearing an appeal against the order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reserving the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reserving the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High court has also to keep in mind that the trial court

had the advantage of looking at the demeanour of witnesses and observing their conduct in the court especially in the witness box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

12. We have though re-appreciated the evidence and we do not find that the conclusion arrived at by the trial Court are perverse. The trial Court has appreciated the evidence in accordance with law and has reached to correct conclusion to acquit the accused. In this case, even any second view is not possible from the evidence recorded. The view taken by the trial Court is possible and probable from the evidence recorded. We, therefore, do not find any merits in this appeal and the same is required to be dismissed.

13. In the result, this appeal stands dismissed.

[J. R. VORA,J.]

[M. R. SHAH,J.]

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